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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10 PETER TILTON,  
11                   Plaintiff,  
12                   v.  
13 THE MCGRAW-HILL COMPANIES, INC.,  
14                   et al.,  
15                   Defendants.

Case No. C06-0098RSL  
ORDER GRANTING IN PART  
AND DENYING IN PART MOTION  
FOR A PROTECTIVE ORDER

16                   **I. INTRODUCTION**

17     This matter comes before the Court on a motion filed by defendant the McGraw-Hill  
18 Companies, Inc. and Michelle Conlin (“defendants”) for a protective order. (Dkt. #8). The  
19 parties have agreed to the terms of a protective order except for two issues: (1) plaintiff’s  
20 counsel does not agree to return or destroy defendants’ confidential documents after the  
21 conclusion of the litigation, claiming he must retain copies for “insurance purposes;” and (2)  
22 defendants want to include a provision that any non-party that receives a document subpoena  
23 can request to produce the documents subject to “attorneys’ eyes only” protection.

24     For the reasons set forth below, the Court grants the motion in part and denies it in part.

25                   **II. DISCUSSION**

26     **A.     Return of Confidential Documents.**

1       The parties have agreed that they can designate certain documents as confidential based  
2 on their sensitive nature. That sensitivity also militates in favor of destroying or returning all  
3 copies at the conclusion of the litigation. Plaintiff's counsel nevertheless argues that he should  
4 be permitted to retain a copy of all documents, including the confidential ones, in case he needs  
5 to defend himself against a malpractice claim. At this point, that concern seems speculative and  
6 unlikely. Furthermore, plaintiff's counsel is not obligated by the ethical rules or his insurance  
7 agreement to retain copies of the confidential documents. Plaintiff's counsel also argues that the  
8 draft protective order that the parties negotiated explicitly permitted him to retain the documents.  
9 Defendants only objected to that provision after plaintiff's counsel signed the draft and believed  
10 the matter was resolved. Although defendants' decision to change their minds is unfortunate and  
11 has apparently undermined some of the goodwill between counsel, it does not justify allowing  
12 plaintiff's counsel to retain defendants' confidential documents.

13       Finally, defendants have suggested a reasonable alternative that should satisfy plaintiff's  
14 counsel's concern about his future ability to obtain the documents.<sup>1</sup> Although plaintiff's counsel  
15 rejected the proposal by arguing that defendants or their counsel might cease to exist as an entity  
16 or fail to maintain the documents as promised, those risks are equally possible if plaintiff's  
17 counsel retains the documents. In sum, the Court finds that each party is best suited to retain its  
18 own confidential documents at the end of the litigation.

19 **B. Attorneys' Eyes Only Designation.**

20       Defendants seek to include the following provision in the protective order:

21       Parties may agree, either separately or unanimously, to provide greater confidentiality  
22 protections to documents and information produced by third parties in response to  
23 subpoenas. Any non-party in receipt of a subpoena may also request that it be allowed to  
24 produce highly sensitive information to the party issuing the subpoena subject to  
25 "attorneys' eyes only" protection restricting distribution to outside and in-house counsel.

26       <sup>1</sup> Pursuant to defendants' proposal, the parties would return all confidential documents at  
27 the end of the litigation. Either defendants or defendants' counsel would keep a set of  
28 defendants' confidential materials and provide plaintiff's counsel with reasonable access if he  
needs them for insurance purposes.

1       The party issuing the subpoena may agree to such protections regardless of whether all  
2       parties agree. The party issuing the subpoena shall not share or distribute copies of any  
3       subpoenaed “attorneys’ eyes only” information to counsel for any other party until such  
4       counsel has agreed to afford “attorneys’ eyes protection” to such information as described  
5       in this Paragraph.

6       Defendants’ Proposed Protective Order (Dkt. #8-2). This provision would allow third parties to  
7       place broad limits on their produced documents without complying with Fed. R. Civ. P. 45.  
8       Furthermore, the “attorneys’ eyes only” limitation on those documents would continue  
9       throughout the litigation, even though only one party agreed to the designation. Defendants  
10      have not shown good cause for such a broad provision at this time, so the Court will not impose  
11      it. Instead, defendants argue that this provision is necessary because Microsoft, plaintiff’s  
12      former employer, has informed defense counsel that it may require “attorneys’ eyes only”  
13      protection for plaintiff’s separation agreement with Microsoft. Defendants and Microsoft have  
14      not explained why designating the document as confidential would be insufficient. Furthermore,  
15      plaintiff does not dispute defendants’ assertion that he has a copy of his separation agreement  
16      but has not produced it to defendants. Accordingly, once a protective order is in place, plaintiff  
17      must produce a copy of the agreement, designated as confidential, to defendants.

18      **C. Sealing of Documents.**

19      Paragraph 10 of the parties’ proposed protective order states that the parties will file  
20      confidential documents under seal and those documents “shall be maintained under seal by the  
21      Court.” As stated in Local Civil Rule 5(g), “[t]here is a strong presumption of public access to  
22      the court’s files and records which may be overcome only on a compelling showing that the  
23      public’s right of access is outweighed by the interests of the public and the parties in protecting  
24      files, records, or documents from public view.” On the few occasions when protective orders  
25      are appropriate, they should be narrowly drawn with a presumption in favor of open and public  
26      litigation. Although the proposed protective order describes categories of confidential  
27      documents, some of the categories are vague and the terms of the order give too much discretion  
28      to the parties to file documents under seal without the Court’s approval. Therefore, in order to

file a document under seal, the filing party must file a stipulation and proposed order to seal or a motion to seal pursuant to the Local Rules. The stipulation or motion must specifically explain why the document should be sealed pursuant to the Local Rules. The stipulation or motion can either be filed before or at the same time as the document filed under seal.

Finally, the parties' proposed order provides that the order may be modified by agreement of the parties; any modification of a protective order entered by the Court must be approved and signed by the Court.

### III. CONCLUSION

For the foregoing reasons, defendants' motion for a protective order (Dkt. #8) is GRANTED IN PART AND DENIED IN PART. Because neither of the parties' proposed orders embodies the parameters set forth in this order, they may present a new proposed protective order, signed by both parties, for the Court's signature.

DATED this 12th day of May, 2006.

Mrs Lasnik  
Robert S. Lasnik  
United States District Judge